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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 324

314-636

JAMES C. B. MILLARD, as Executor of the Will of Jay Gould, deceased,

Petitioner.

vs.

HARRY A. MALONEY,

Respondent.

PETITION FOR *CERTIORARI* AND BRIEF IN SUPPORT THEREOF.

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Petition for *Certiorari.*

Supreme Court of the United States

OCTOBER TERM, 1941.

No.

JAMES C. B. MILLARD, as Executor of the Will of Jay Gould, deceased,
Petitioner,

vs.

HARRY A. MALONEY,
Respondent.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of James C. B. Millard, as executor of the Estate of Jay Gould, deceased, respectfully shows unto your Honors:

A.

Summary Statement of Matter Involved.

This is an estate tax case. The petitioner paid to the respondent under duress and protest as a Federal estate tax on the Estate of Jay Gould, deceased, hereinafter sometimes referred to as the decedent, the sum of $190,892.30.

The petitioner brought an action against the respondent, who was Collector of Internal Revenue for the First District of New Jersey, to recover back the amount paid as aforesaid, as illegally assessed and collected. There is no dispute as to the value placed by the Commissioner, but the question is solely one of taxability. The Commissioner included in the Estate of Jay Gould for Federal Estate Tax purposes, two certain items, reference to which was made in the Estate Tax Return for information purposes only. The return as filed showed no net taxable estate.

These two items are set forth in detail in paragraph 9 of the Complaint (R. 4).

The first is the inclusion in the estate of the value of the property constituting the subject matter of a trust set up by the decedent in 1922 in his lifetime.

The second item consists of the commuted value of certain payments payable directly to the plaintiff as Executor of Jay Gould under and by virtue of the provisions of a Judgment of the Supreme Court of the State of New York, entered pursuant to a stipulation for compromise, of a suit in that court involving the accounts of the Executors of and Trustees under the Will of Jay Gould, the First, grandfather of the decedent.

We deal first with the Deed of Trust which is Exhibit A annexed to the Complaint (R. 19). By that document the decedent who was then 34 years of age and in the best of health, assigned to his Trustees his remainder interest in the Will of his grandfather, Jay Gould, the First, who died in the year 1892.

The grandfather was survived by his six children, George, Edwin, Howard, Helen, Anna and Frank. His Will provided that the residue of his estate was to be divided into six equal parts, one for each child, who was to receive the income from that part for life, and upon his or her death, the principal was to be paid to his or her issue.

The material parts of the Will of Jay Gould, the First, are recited in the Deed of Trust by the decedent (R. 19).

Our decedent's father, George J. Gould, died in May, 1923. In his Will (R. 76) he directs that the remainder interest under the grandfather's Will be equally distributed among his seven children, of whom the decedent was one.

Thus on the death of George J. Gould in May, 1923, there vested in possession (except for the Deed of Trust), in our decedent, one-seventh interest in the principal of the Trust set aside by Jay Gould, the First, for his son, George, and such share was, pursuant to the Deed of Trust hereinabove mentioned, thereupon paid over to our decedent's Trustees named under such Deed.

By this Trust deed executed as we have seen, in 1922, our decedent reserved to himself the income for his life and with respect to the principal,

> "Upon his death * * * forthwith to pay over * * * the principal of the Trust Fund * * * to the lawful descendants of the party of the first part in such proportions as the party of the first part shall in and by his last Will and Testament appoint, and in case of failure to make such testamentary appointment then to such descendants absolutely, in equal shares, per stirpes and not per capita; * * * It is understood and agreed however anything herein con-

> tained to the contrary notwithstanding that the party of the first part may by Will charge the Trust Fund with the payment of the income of said fund or any part thereof to the use and for the benefit of the wife of the party of the first part during her life or for any shorter period." (R. 22.)

The Testator's wife and three children survived him (R. 51).

Our decedent in and by his Will exercised the special power in favor of his wife and charged the principal of the Trust Fund with the payment of its income to her for her life, but he did not execute the special power to change the proportions among his descendants but permitted the principal to go in default of appointment (R. 75).

At the time of the execution of the Trust our decedent was 34 years of age, in excellent health and the trust was made at the request of his father because the decedent was largely indebted and had shown himself to be a spendthrift and it was made to protect himself, his wife and children (R. 70). The decedent died in 1935.

The Commissioner of Internal Revenue determined that the value of the Trust Estate was a transfer, although made in 1922, within the meaning of Section 302 (d) of the Revenue Act of 1926 as amended.

There was, however, no contention by the defendant in the Court below that the Trust was made in contemplation of death or intended to take effect in possession or enjoyment at or after death within the purview of Section 302 (c). The sole contention litigated in the Courts below with respect to the Deed of Trust was that subdivision (d) which

was first enacted in 1924 could be applied retroactively to the Deed of Trust made in 1922.

The petitioner contends that this could not be done without violating the Fifth Amendment to the Constitution of the United States.

The second half of the case involves something entirely different. We have seen that Jay Gould, the First, our decedent's grandfather by his Will divided his entire estate into six equal parts, one of which to be held in trust for each of his six children for life, and upon the child's death, to pay the principal to his or her issue, in such proportions as he or she might direct by Will, and failing such, then to such issue, in equal shares per stirpes and if no issue, then to his or her brothers and sisters, and the issue of any deceased brother or sister, in equal shares per stirpes (R. 19). The Executors and Trustees accounted in the Supreme Court of the State of New York and numerous objections were filed which resulted in an opinion by the Referee indicating surcharges against the Executors and Trustees then living, Edwin, Helen, Howard and the Estate of George J. Gould, who had died pending the litigation of upwards of $40,000,000. Many claims and counterclaims were made against each other by the parties to that action. The litigation extended to the Court of Chancery of New Jersey. After many years the questions became so involved that the litigants decided to compromise.

In the negotiations leading to that compromise it was considered that since Helen and Howard Gould, two of the children of the common ancestor had no children of their own and were not likely to have any, and that consequently upon their deaths the portion of the principal set aside

under the Will of Jay Gould, the First, for each of them, would come to the children of George J. Gould of whom our decedent was one. Surcharges, of course, are ordinarily payable, forthwith, but in view of the size of the surcharges and the fact that the children of George J. Gould would thus, in all probability receive a substantial portion of the principal of the Trust Fund set aside for Helen and Howard Gould, two of the surcharged Trustees, a sum commensurable with the estimated value of such anticipated or deferred share was allowed as a credit against the surcharges payable. The Stipulation for Compromise and the Judgment thereon provided that in order to make up for the loss of income from the deferment of the vesting in possession in the children of George J. Gould of those amounts, that Edwin, Helen and Howard should pay annually, in equal shares to the seven children of George, while Helen and Howard lived, a sum of $54,000. and after the death of one of them, and during the life of the survivor, the sum of $30,000. Such payments were to be made to those seven children during their respective lives and after their deaths, and during the life of the survivor of Helen and Howard, to their respective executors or administrators (R. 45).

There was no provision in the Judgment (R. 45) for the setting up of a fund to guarantee or in anywise provide for the continuance of those annual payments. The Judgment simply imposes a personal obligation on the payors.

The Commissioner of Internal Revenue ruled that all of such annual payments received by our decedent in his lifetime constituted income in his hands for income tax purposes and he paid the income tax thereon each year. Nevertheless the Commissioner also ruled that the com-

muted value at the date of our decedent's death of the annual payments which might be receivable after his death, contingent though they be, should be included in his gross estate for estate tax purposes. The petitioner, of course, contends that they should not be so included, but that each annual payment, if, as and when received, will be income to the recipient.

The case was tried before his Honor, Judge Forman, without a jury. The Judge filed a written opinion (R. 77) findings of fact and conclusions of law (R. 89) and rendered judgment in favor of the defendant on both points.

And appeal was taken to the United States Circuit Court of Appeals for the Third Circuit, which Court affirmed the District Court, Circuit Judge Biggs writing the opinion (R. 99). It is to review that judgment that the petitioner now petitions this court.

B.

Reasons Relied On for Allowance of Writ.

The statute under which jurisdiction is conferred on this Court is Title 28 § 347 of the United States Code, being the Act of February 13, 1925, C. 229, § 1, 43 Stat., 938. This statute, so far as material, reads:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court,

> that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

In affirming the judgment of the District Court, the Circuit Court of Appeals decided that an irrevocable transfer made by the deed of trust of 1922 and absolutely vested when made in a limited class of beneficiaries, consisting of the settlor's wife and descendants, from which class the settlor (our decedent) could not divert the fund, and transferred beyond the recall of any portion thereof to the settlor, made in 1922, might be reached by the retroactive application of sub-division (d) of § 302 of the Revenue Act of 1926 as amended, without violating the Fifth Amendment to the Constitution.

In so affirming the Circuit Court of Appeals also decided that annual payments receivable by our decedent pursuant to a judgment payable by two persons (other than the decedent) during the life of the survivor of them, and payable to the decedent for his life, and after his death to his executor or administrator, where no fund is set up as a guaranty to produce such annual payments, constitutes an asset to be capitalized on a commuted basis, and as such includible in the decedent's gross estate.

In each of such holdings the Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court, and has decided a Federal question in a way probably in conflict with the applicable decisions of this court.

In the first of such holdings, that dealing with the Fifth Amendment, the Circuit Court of Appeals for the Third Circuit rendered a decision in conflict with the Circuit Court of Appeals for the Second Circuit.

Wherefore your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the cause therein entitled James C. B. Millard, as executor of the *Estate of Jay Gould, deceased, Plaintiff-Appellant* vs. *Harry A. Maloney, Defendant-Appellee,* No. 7643; and that the said judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the said cause on the 6th day of June, 1941, may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court should seem meet and just.

And your petitioner will ever pray, etc.

JAMES C. B. MILLARD,
As Executor of the Estate of Jay Gould,
Deceased, by
GEORGE W. C. MCCARTER,
Of Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1941.

No.

JAMES C. B. MILLARD, as Executor of the Will of Jay Gould, deceased,
Petitioner,

vs.

HARRY A. MALONEY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI.*

A.

The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals is not yet reported, but is found at page 99 of the Record. The opinion of the District Court is reported, 36 Fed. Supp. 41, and is found at page 77 of the Record.

B.

Jurisdiction.

I.

The statutory provision sustaining the jurisdiction of this Court is Title 28 § 347 of the United States Code, being the Act of February 13, 1925, C. 229 § 1, 43 Stat. 938, which is hereinabove quoted in the petition for *certiorari* at page 7 *supra*.

II.

The date of the judgment sought to be reviewed is June 6, 1941.

III.

The grounds on which jurisdiction in this court is invoked are the following: The judgment of the Circuit Court of Appeals (R. 104) affirmed the judgment of the District Court dismissing the petitioner's complaint (R. 90). The complaint, and in particular in and by paragraph 34 thereof (R. 16), shows the legal and Constitutional grounds asserted by the petitioner. The overruling of this position and the taking of diametrically opposite grounds appears, not only from the opinion of the District Court (R. 100), but from the first and second conclusions of law of the District Judge (R. 90). The Circuit Court of Appeals by its affirmance (R. 104) sustained those conclusions of law.

The first of these reads:

> "The reservation by Jay Gould II of the power to affect by his will the proportionate interests of

> the beneficiaries of the trust indenture of October 19, 1922 and the reservation of the right to charge the income from the principal of that fund to his wife rendered the trust fund of Jay Gould II taxable within the purview of Section 302 (d) of the Revenue Act of 1924, as amended."

The Circuit Court of Appeals by so ruling rendered a decision in conflict with the following decisions of the Circuit Court of Appeals for the Second Circuit: *Commissioner* v. *Flanders*, 111 Fed. 2d 117; *Mackay* v. *Commissioner*, 94 Fed. 2d, 558.

The Circuit Court of Appeals by so ruling decided an important question of Federal law, which either is in conflict with the applicable decisions of this Court, namely: *Helvering* v. *Helmholz*, 296 U. S. 93; and *White* v. *Poor*, 296 U. S. 98; or, in the alternative, if those cases be not deemed strictly and entirely controlling, the Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court.

The second conclusion of law reads:

> "The funds which accrued to Jay Gould II and his executor as a result of the compromise judgment rendered in the Supreme Court of New York in the case of Gould *v.* Gould are taxable pursuant to the provisions of Section 302 (a) of the Revenue Act of 1926, since the interest of the decedent extended to all the moneys flowing from this source."

The Circuit Court of Appeals by its affirmance necessarily adopted this conclusion of law. By so doing that Circuit Court of Appeals has decided a Federal question in conflict with the applicable decision of this Court in *Bull* v. *United States*, 295 U. S. 247.

IV.

Cases believed to sustain the jurisdiction of this Court include the following. Among the many cases holding that this Court will by *certiorari* review the judgment of a Circuit Court of Appeals under circumstances such as those in this case, are *Porter* v. *Commissioner*, 288 U. S. 436; *Helvering* v. *Helmholz*, 296 U. S. 93; *White* v. *Poor*, 296 U. S. 98.

C.

Statement of the Case.

The case has been stated under the heading "Summary Statement of Matter Involved" in the petition, commencing at page 1 *supra*, to which the Court is respectfully referred. That statement will not be here repeated, but will only be very briefly supplemented.

As to the first point, the question of the taxability of the corpus of the trust fund, it is clear that from and after the effective date of the deed of trust in 1922 the decedent had a life estate therein, and the whole interest after his death belonged to his wife and descendants indefeasibly. Nothing that the decedent, either acting alone or in conjunction with any other person or persons, might do, could revoke the trust or divert the total interest therein after his death from that small group. He could, however, by not exercising the special power of appointment by will prevent his widow from having a life interest in remainder, and he could by will alter the shares of his descendants as among themselves (R. 22).

As to the taxability of the commuted value of the payments pursuant to the New York judgment in *Gould* v. *Gould,* we point out there is absolutely no capital fund set aside out of which the payments are made, or on which they are charged. The judgment pursuant to which they are paid simply directs that Helen Gould Shepard and Howard Gould make these payments (R. 45). They are nothing more nor less than the personal obligations of Helen and Howard. These obligations exist by virtue of the New York judgment and endure for the respective lives of the payors. They are not a real annuity, because, as we understand it, that is something payable for the life of the recipient. They are sort of the reverse of an annuity, being sums payable for the lives of the two payors. They were payable to Jay Gould, our decedent, during his life, but at his death his interest in them terminated.

D.

Specification of Errors Intended to Be Urged.

Several of the assignments of error really make the same point in different ways. The petitioners rely upon the assignments of error numbered 1 (R. 91), 2 (R. 91), 3 (R. 91), 4 (R. 92), 5 (R. 92), 22 (R. 96), 23 (R. 96), 24 (R. 96), 25 (R. 97), 26 (R. 97), 28 (R. 98), 29 (R. 98).

These several assignments, however, make only two points. They are all there are in the case. The first point is that to apply retroactively to the trust made in 1922 sub-division (d) of Section 302 of the Revenue Act of 1926 as amended, violates the Fifth Amendment to the Constitution. The second point is that the annual payments receiv-

able by the petitioner pursuant to the New York judgment in *Gould* v. *Gould* does not constitute an asset to be capitalized on a commuted basis, and as such includible in the gross estate.

E.

ARGUMENT.

Summary.

I.

The property constituting the trust fund cannot constitutionally be included in the decedent's gross estate.

1. The irrevocable transfer made by the decedent's deed of trust was not taxable under the law as it stood at the effective date of the deed of trust in 1922, but only by the retroactive application of a statute passed for the first time in 1924, after the effective date of the deed of trust.

2. Without violating the Fifth Amendment to the Constitution, Section 302 (d) cannot apply retroactively so as to make taxable at the decedent's death in 1935 the interests under the deed of trust which vested in 1922.

II.

The commuted value of the payments pursuant to the New York judgment are not properly part of the decedent's gross estate.

I.

The property constituting the trust fund cannot constitutionally be included in the decedent's gross estate.

1. The irrevocable transfer made by the decedent's deed of trust was not taxable under the law as it stood at the effective date of the deed of trust in 1922, but only by the retroactive application of a statute passed for the first time in 1924, after the effective date of the deed of trust.

Neither the defendant nor the Commissioner of Internal Revenue has ever contended to the contrary. This point, on the other hand, has at all times been conceded by counsel for the respondent, as it would have to be under decisions of this Court such as *May* v. *Heiner,* 281 U. S., 238; and *Hassett* v. *Welch,* 303 U. S., 303. The argument of counsel for the respondent and the position taken by the courts below is that the property constituting the trust of 1922 is taxable under the Revenue Act of 1926, which, so far as material, directs the inclusion in the gross estate of:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke * * * §302 (d)."

This legislation first appeared in the Act of 1924 and therefore after the effective date of the deed of trust.

2. Without violating the Fifth Amendment to the Constitution, Section 302 (d) cannot apply retroactively so as to make taxable at the decedent's death in 1935 the interests under the deed of trust which vested in 1922.

Fundamentally and generally speaking of course the Fifth Amendment prevents the retroactive effect of a statute on interests validly and irrevocably created prior to the statute's enactment. This has been many times held by this Court with respect to this very sub-division (d). We need cite only *Helvering* v. *Helmholz,* 296 U. S., 93; and *White* v. *Poor,* 296 U. S., 98.

Neither counsel for the respondent nor the courts below dispute this. Their thesis is that the interests in the trust after the death of the settlor-life tenant were sufficiently fluid to be taxable by subsequent legislation, notwithstanding the Fifth Amendment. It will be remembered that by the deed of trust the settlor did reserve the right by will especially to appoint to his widow for life and to vary the interests of his descendants. The courts below held that this special power permitted Section 302 (d) to be applied retroactively without violating the Fifth Amendment to the Constitution. In so holding the courts below rely principally on *Porter* v. *Commissioner,* 288 U. S., 436. The Circuit Court of Appeals and other lower Federal courts have found difficulties in applying the doctrine of *Porter* v. *Commissioner, supra,* and the results of their efforts to apply that doctrine have been, to say the least, disharmonious.

We start with the conceded proposition that a revocable trust is so much the equivalent of property owned outright by the settlor down to the date of his death that without violating the Fifth Amendment legislation effective at date

of death, but post-dating the creation of the trust, may constitutionally be applied. That is fully conceded. For the best understanding there should be a brief chronological review of the cases. The ruling with respect to section 302 (d) was first laid down in decisions of Circuit Courts of Appeal. *Brady* v. *Ham,* 45 Fed. 2d, 454 (C. C. A.) and *Cover* v. *Burnet,* 53 Fed. 2d, 915 (C. C. A.).

In the case of *Cover* v. *Burnet,* 53 F. (2d) 915, the decedent in 1918 set up a trust reserving to himself "the right, at any time * * * during my (his) life, to alter, change, or modify the trust * * * created, without the right to withdraw any part of the principal * * *". The decedent died March 26, 1926, and the government attempted to tax the trust fund as a transfer in contemplation of death (Section 302 (c) Act of 1926), because of the reservation contained in the instrument, and for the same reason it attempted to tax under Section 302 (d). The court disallowed this tax, and stated:

> "We do not agree with this claim, for it is expressly stipulated in the reservation that the grantor shall have no right thereafter to withdraw any part of the principal from the trust. In other words, the grantor reserved no power to repossess himself at any time of any part of the principal of the fund, nor to withdraw the same from the beneficiaries who were to receive it under the terms of the trust instrument." 53 F. (2d) 915, 916.

In the case of *Brady* v. *Ham,* 45 F. (2d) 454, the decedent in 1911 set up a trust fund reserving to herself power "to change and alter any or all of the trusts * * * set forth, (and) to name any beneficiaries other than those

above named *except herself* * * *". The government asserted its right to tax under the Revenue Act of 1924, Section 302 (d) *supra*. The court pointed out that this was an estate tax and not a succession tax, and that Congress could not impose a death tax upon property absolutely transferred prior to the death of the decedent. The court concluded that there could be no such tax if the economic benefits passed under the trust deed from the decedent's control beyond recall, and hence, disallowed the tax, since the decedent had irrevocably disassociated herself from the economic benefits of the property in question; this, notwithstanding the fact that the beneficiaries could not have been definitely ascertained until her death.

As against these cases, however, we have *Porter* v. *Commissioner*, 60 Fed. 2d, 673 (C. C. A. 2). The opinion of the Circuit Court of Appeals in the *Porter* case certainly is inconsistent with that of *Cover* v. *Burnet* and *Brady* v. *Ham*. *Porter* v. *Commissioner* went to this Court, 288 U. S. 436, and the judgment of the Circuit Court of Appeals was affirmed, but on different reasoning and grounds. The opinion of this Court was delivered by Mr. Justice Butler. He pointed out at page 443:

> "We need not consider whether every change, however slight or trivial, would be within the meaning of the clause. Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. *So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is re-*

> *vocable.* * * * *But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income.* His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in § 301 is called the net estate. *Thus was reached what it reasonably might deem a substitute for testamentary disposition.*" (Italics ours.)

This Court therefore did not decide the *Porter* case on the same ground as that used by the Circuit Court of Appeals. This Court looked at the terms of the trust deeds in that case in a practical way and concluded that they were for tax purposes the same as if they were, in so many words, revocable. The best evidence that the Porter transfers were the same as revocable is found in the fact that one of them was revoked. This clearly appears from the opinion of Mr. Justice Butler, 288 U. S. at page 439.

It appears from the opinion of Learned Hand, *J.*, in the Circuit Court of Appeals, 60 Fed. 2d, 673, at page 674:

> "The Commissioner answers that the power was in effect beneficial, despite its limitation. The donee might revoke the original limitation and select a facile beneficiary; might even make an agreement beforehand that the substitute should unite with him to terminate the trust, as is possible in New York, when all the beneficiaries are in being. * * * The settlor's death was therefore an event upon which an

> excise might be levied; and, since the settlor might at any time resume the property as his own, the funds could be included in his estate. * * * Though he has finally denuded himself, he controls the disposition while he lives; the existing limitations are conditional upon his pleasure."

So, in the *Porter* case, the settlor under the terms of the transfers could do anything except revoke or revest title to the assets in himself or his estate. Indeed, as pointed out by Learned Hand, *J.*, in the passage last quoted, in effect, he could have done that because he could have modified the trusts so as to make as sole beneficiary thereof some individual of his selection, friendly to him, who would then unite with him in revoking the trust and revesting it in the settlor. Under the laws of the State of New York a trust can be revoked with the consent of all parties interested. Very properly, therefore, this Court treated the trusts in the *Porter* case as if they were revocable. This is very proper, for as Mr. Justice Sutherland said in *Tyler* v. *United States*, 281 U. S. 497, 503:

> "Taxation, as it many times has been said, is eminently practical * * *."

There was no real difference in the *Porter* case between the situation in which the decedent was with respect to the trusteed property after the creation of the trusts, and that he would have been in if he had retained full and absolute ownership in himself down to the date of death.

The trouble with the situation is that some of the subsequent Circuit Court of Appeals decisions have followed the *Porter* case, as of course they should, but have done so on the grounds given by the Circuit Court of Appeals, rather

than those given by this Court. We, of course, have and can have no quarrel with the doctrine of this Court in the *Porter* case. We concede that where the decedent in and by his trust has, whatever may be the device used, retained in effect such control that it is tantamount to the same as if he had died owning the *res* outright, the trust may be treated as if revocable, and, without violating the Fifth Amendment, there may be applied the law in effect at the time of his death.

Decisions of this Court, other than the *Porter* case, conclusively show that the reasoning of the Circuit Court of Appeals in the *Porter* case is not sound. These later decisions establish the rule that, except where the settlor's reserved control is the substantial equivalent of continued outright ownership, section 302 (d) cannot, without violating the Constitution, be applied retroactively. We refer to *Helvering* v. *Helmholz*, 296 U. S. 93; and *White* v. *Poor*, 296 U. S. 98.

Instead of following these cases the courts below took a different view. Biggs, *J.*, for the Circuit Court of Appeals, said:

> "We think it is entirely clear that the trust res may be included in the grantor's gross estate without violating the due process clause of the Fifth Amendment for the grantor retained until the time of his death complete power to alter or amend the interest of any one of the beneficiaries. The trust indenture specifically provided that the grantor by an ambulatory instrument, a will, could cut off any of his legal descendants or modify their inheritance as he saw fit. In Hallock *v.* Helvering, 309 U. S. 106, 110, the Supreme Court stated that, 'Whether the

> transfer made by the decedent in his lifetime is "intended to take effect in possession or enjoyment at or after his death" by reason of that which he retained, is the crux of the problem'. The economic benefits of the trust res in the case at bar passed literally at the testator's death and in fact were not definite and certain within the designated group of beneficiaries until the grantor's death." (R. 101.)

Forman, *J.*, for the District Court, said:

> "Constitutional objections cannot be made unless the settlor has irrevocably parted with his property, *and all dominion over it* prior to the effective date of the statute." (Italics ours.) (R. 85.)

That, however, is not what *Porter* v. *Commissioner, supra,* held. As we have hereinabove pointed out in that case, the settlor in fact retained until death such control over the *res as was the equivalent of absolute ownership.* Moreover, the opinion of this Court hereinabove quoted on page 20 hereof shows that such retention of control was the basis of the decision.

In *Helvering* v. *Helmholz*, 296 U. S. 93, members of a family, two parents and their children, transferred the stock of a family corporation, of which the settlors were the stockholders, upon certain trusts to pay dividends to them and their issue during the existence of the trust, and for disposition of the shares upon its termination. The trust was to terminate (1) on the death of the last surviving grandchild; (2) upon the delivery to the trustee of a writing signed by all the then beneficiaries; (3) upon the unanimous vote of the directors of the family corporation; or (4) upon the dissolution thereof. The trust also pro-

vided that each of the settlors might by will appoint to any person for life, and the decedent in that case did so appoint to her surviving husband. The details of this power of appointment do not clearly appear in the opinion of this Court, but do so appear in the opinion of Groner, *J.*, for the United States Court of Appeals for the District of Columbia, 75 Fed. 2d, 245:

> "By its terms, each subscriber was entitled to * * * the right to designate by last will and testament a natural person to whom the dividends should thereafter be paid, but only during the life of the appointee, * * *"

The exact language of the trust deed by which this general power to appoint for life was reserved is quoted in the opinion of the Supreme Court of Wisconsin in the parallel case of *First Wisconsin Trust Co.* v. *Helmholz*, 198 Wis. 573; 225 N. W. 181. By virtue of this power Mrs. Helmholz could by her will, an ambulatory document, give anybody in the world a life interest in the trust. Until she died those who took in default of appointment could not be sure that someone would not receive a life estate in the trust. By the same token, anyone who did receive a life estate (as was the case by virtue of Mrs. Helmholz' appointment to her husband) received it only by virtue of Mrs. Helmholz' will. Nevertheless, Groner, *J.*, for the United States Court of Appeals for the District of Columbia, quoted the opinion of the Board of Tax Appeals and said, as follows:

> "They said: 'In the instant proceeding, Mrs. Helmholz had irrevocably disposed of the corpus of the trust, and that property went to the remaindermen designated in the trust agreement, upon the

termination of the trust. She had no power to alter, amend, or revoke the trust instrument that would effect such a disposition as was possible in the Porter case and bring the property within the purview of subdivision (d).' * * * Relying on this section, the Commissioner tells us that under the trust agreement there were listed a number of contingencies, any one of which might have occurred, under which the trust would terminate. In such event, the Commissioner says, the corpus was to revert to the settlors. Therefore, he says, none of the remainder beneficiaries had the enjoyment of the property during the life of the settlor, and none acquired by the indenture the absolute and unconditional right to future possession and enjoyment. But we are unable to follow the Commissioner's argument in this respect, and we think it perfectly obvious, as the Board found, that in the trust agreement Mrs. Helmholz divested herself completely of legal title to the shares contributed by her to the trust estate and merely reserved a life interest in the income and a limited power of appointment respecting it; and, if we are correct in this conclusion, it follows that the value of the shares of stock which she transferred to the trust some nine or ten years before her death could not legally be included in determining the amount of her estate. * * *

The trust agreement as a whole clearly shows that no one of the subscribers can take any action to terminate the trust or retake his or her contribution to the trust, without the assent and co-operation of all, and this is enough to make the transfer absolute as of the date of the agreement." 75 Fed. 2d, 245, 246.

Certainly *Helvering* v. *Helmholz* decides that the fact that the settlor has a general testamentary power to ap-

point for life, and is one of a group which has the right to revoke, does not permit § 302 (d) to be applied retroactively. On the contrary, it expressly holds that such a retroactive application would violate the Fifth Amendment to the Constitution. Nevertheless, in the *Helmholz* case Mrs. Helmholz, the decedent, retained the right until her death to affect to some extent the interests of those taking subsequent to her under the deed of trust. Until she died she could give or not as she chose a life interest to any natural person in the world. Furthermore, she could, as one of the stockholders of the family corporation, take part in dissolving it. Upon her death if she exercised her power of appointment her appointee through her will got something and those taking in default got less. If she had not appointed those taking in default of appointment would get more. Until her death there was, so to speak, a cloud on the latter's title, which, until that event, could not be removed. Only by her death could those taking in default get the assurance that they could not and did not have theretofore. *Helvering* v. *Helmholz,* therefore, is an unequivocal and direct authority to the effect that the possible testamentary creation of a life interest, or, conversely, the freeing of the right of those taking in default of appointment from the contingency of such life interest by the decedent's death, does not render the remainder interests in the trust sufficiently fluid to permit them, without violating the Fifth Amendment, to be taxed by subsequent legislation.

There is another factor essentially involved in *Helvering* v. *Helmholz.* The decedent, as one stockholder of the family corporation, could, so long as she lived, do her part to dissolve the corporation, and hence to accomplish the

termination of the trust. It was not until her death that those interested in remainder in the trust were freed from the possibility of such action by her. While her action alone could not effect a destruction of the remainder interests, she could do her part, and by her death the possibility of her doing that part was removed. Unquestionably, therefore, the death of the decedent in *Helvering* v. *Helmholz* did add to the remainder interests an assurance which until that they did not have. Of course her will created in the appointee for life an interest which but for such will he never would have possessed. It follows conclusively, therefore, that the mere fact that the decedent keeps some finger in or hold upon the rights of interests of others in the trust, which hold does not and cannot terminate until the decedent's death, does not make it constitutional to apply §302 (d) retroactively. This, we submit, is wholly inconsistent with the decision of the courts below in the case at bar, as appears particularly from the hereinabove excerpts from their opinions. *White* v. *Poor,* 296 U. S. 98, while by no means as important as *Helvering* v. *Helmholz, supra,* is to the same general effect.

Perhaps the most recent relevant pronouncement of the Supreme Court was that delivered by the present Chief Justice in *Estate of Sanford* v. *Commissioner,* 308 U. S. 39 (1939). In that case Mr. Justice Stone said, at page 43:

> "The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with power reserved to the donor either to revoke it and recapture the trust property or to modify its terms *so as to designate new beneficiaries* other than himself is incomplete, and becomes complete so as to subject the

transfer to death taxes only on relinquishment of the power at death." (Italics ours.)

The power of Jay Gould, the decedent, in the case at bar, however, was not as broad as that laid down by Mr. Justice Stone. Jay could do but little. He could appoint to his widow for life, and he did so. It was, however, held in *Helvering* v. *Helmholz, supra,* in a case where the settlor of a trust had a general power to appoint to anyone at all *for life,* and not just to his or her surviving spouse, that the settlor's control was not sufficient to permit the retroactive application of § 302 (d). This recent decision of this Court establishes the principle that *it is not the rule* that because the settlor had *some little control* over what happened to the trust *res* after his death, that § 302 (d) might be applied retroactively. It demonstrates, on the contrary, the soundness of the true interpretation of *Porter* v. *Commissioner, supra,* namely, that for § 302 (d) to be capable of retroactive application, the control by the testator must be the substantial equivalent of a power of revocation. So far as our decedent's power to appoint to his widow for life is concerned, therefore, we do not need to rely on argument, but can authoritatively point to *Helvering* v. *Helmholz, supra.*

So far as his power to discriminate among his descendants is concerned, we say, first, that such a limited and circumscribed power is not within the reasoning of *Porter* v. *Commissioner, supra,* in this Court, or within the language of Mr. Justice Stone, hereinabove quoted from *Sanford* v. *Commissioner.* We say, in the second place, that such a power is of course very different from the complete control retained in case the settlor has a power of revocation, or

through any other device whatsoever may keep himself in full control to the same extent as if he retained absolute ownership to the date of his death.

On the other hand, the right to the corpus was in 1922 absolutely and indefeasibly vested in the limited and narrowly circumscribed class of our decedent's descendants. This was so vested by the relevant New York law, which of course controlled this trust (see Paragraph Fourteenth of the Trust Indenture, R. 29) namely, Section 40 and 41 of the New York Real Property Law, and Section 11 of the New York Personal Property Law. But the situation is not dependent upon any technical distinction between vested and contingent remainders. In conformity with the rule laid down by this Court, speaking through Mr. Justice Frankfurther, in *Helvering* v. *Hallock*, 309 U. S. 116, 117, we need not concern ourselves with "niceties of the art of conveyancing," or "illusive and subtle casuistries which may have their historic justification, but possess no relavance for tax purposes." The corpus was vested in the decedent's descendants in the practical sense that from and after the effective date of the deed of trust in 1922 it was theirs and theirs only. From that class the corpus could not be diverted by any action or inaction of our decedent or of anyone else. True, our decedent could by will alter the shares of the members of the class among themselves. This very limited, and, indeed, trivial, power is a very far cry from the practical complete domination, the equivalent of ownership until date of death, which in *Porter* v. *Commissioner, supra,* was held by this Court to permit the retroactive application of subdivision (d). In the case at bar the corpus of the trust was prior to the first enactment of

subdivision (d) in 1924, so completely the indisputable property of our decedent's descendants that (d) cannot be applied retroactively without violating the Fifth Amendment. Such retroactive application would take away from the class that which indefeasibly was its.

Biggs, *J.*, in delivering the opinion of the Circuit Court of Appeals (R. 101) cited *Hallock* v. *Helvering*, 309 U. S. 106. That case is not at all in point, for in the very sentence following that quoted by Biggs, *J.*, Mr. Justice Frankfurter said:

> "We must put to one side questions that arise under sections of the estate tax law other than § 302(c)—sections, that is, relating to transfers taking place at death."

In reaching the conclusion arrived at below, the Circuit Court of Appeals only persisted in the position theretofore taken by it in *Cook* v. *Commissioner*, 66 Fed. 2d, 995. The same heretical situation prevailed, perhaps even more clearly, at one time in the Second Circuit in *Witherbee* v. *Commissioner*, 7 Fed. 2d, 696; and *Commissioner* v. *Chase National Bank*, 82 Fed. 2d, 157. The Second Circuit Court, however, has returned to orthodoxy in cases such as *Mackay* v. *Commissioner*, 94 Fed. 2d, 558; and *Commissioner* v. *Flanders*, 111 Fed. 2d, 117. It is respectfully submitted that by reason alone of this disharmony between the Circuits, *certiorari* should be granted.

Aside from that, however, we submit that the true intent and meaning of the decisions of this Court in *Porter* v. *Commissioner and Helvering* v. *Holmholz, supra*, does not seem to be understood by the inferior tribunals. If this

Court takes the view that those cases are crystal clear in their meaning, then the decision of the courts below is a decision on an important question of Federal law in conflict with the applicable decisions of this Court. If, on the other hand, this Court feels that the true intent and meaning of *Porter* v. *Commissioner* and *Helvering* v. *Holmholz* is not apparent, then the ruling for which we contend, namely, that for §302 (d) to be constitutionally applicable retroactively, the control reserved by the settlor must be the equivalent of absolute ownership, is an important question of Federal law, which should be settled by this Court. On any and all of the foregoing grounds this case is one for the exercise by this Court of its right of review by *certiorari.*

II.

The commuted value of the payments pursuant to the New York judgment are not properly part of the decedent's gross estate.

The facts with respect to these payments are hereinabove set forth at pages 5-7 hereof. They may be summarized by stating that pursuant to a stipulation for compromise (R. 46) and a judgment of the New York Supreme Court (R. 45) the decedent during his life had the right to receive certain annual payments from Helen Gould Shepard and Howard Gould; and under and by virtue of the judgment the decedent's executor or administrator had the right to receive those same payments during the lives of the payors. We feel that the case is controlled by the decision of this Court in *Bull* v. *United States,* 295 U. S.,

247; and that the proper application of that decision compels a conclusion contrary to those of the courts below. In *Bull* v. *United States,* the decedent was a member of a personal service partnership which had no invested capital. The partnership agreement provided that in the event of a partner's death the survivors, in the event the decedent's executor or administrator should not object, should be at liberty to continue the business for a year; the estate of the deceased partner in that case to share the profits or losses as the deceased partner would have done if living. The decedent died February 13, 1920. His share of the profits from January 1st to the date of his death was $24,124.20. Profits accruing to the estate from the period of the decedent's death to the end of 1920 were $212,718.79. The Court of Claims held that the profits accruing to the estate for the balance of the year after the date of the decedent's death were part of the decedent's gross estate. This Court, however, held to the contrary. Mr. Justice Roberts, delivering the opinion of the Court, said, at page 254:

> "Here, however, the survivors have purchased nothing belonging to the decedent, who had made no investment in the business and owned no tangible property connected with it. The portion of the profits paid his estate was, therefore, income and not corpus; and this is so whether we consider the executor a member of the old firm for the remainder of the year, or hold that the estate became a partner in a new association formed upon the decedent's demise."

and, again, at page 256:

> "In the light of the facts it would not have been permissible to place a value of $212,718.99 or any other value on the mere right of continuance of the

> partnership relation enuring to Bull's estate. Had he lived, his share of profits would have been income. By the term of the agreement his estate was to sustain precisely the same status *quoad* the firm as he had, in respect of profits and losses. Since the partners contributed no capital and owned no tangible property connected with the business, there is no justification for characterizing the right of a living partner to his share of earnings as part of his capital; and if the right was not capital to him, it could not be such to his estate."

Why is not the situation in the case at bar identical? In addition to *Bull* v. *United States* there are two inferior court decisions which we submit are very much in point. *In re Chemical Bank & Trust Co., Exrs.*, 37 BTA 535. In this case the decedent in his lifetime purchased for a lump sum an annuity payable to him as long as he should live, and at his death if his wife survives him then payable to her as long as she should live. She did survive the decedent, and the Commissioner included in the gross estate the value at the date of the decedent's death of the annuities that were payable to his wife. The annuities were irrevocable. The decedent had no right to change the beneficiary, and no control or interest other than his right to receive the annuities during his life. This right ceased at his death. The wife had the absolute right to receive the annuities after his death if she survived him, which vested at the time the contracts were made. It was held that the commuted value of the annuities at the date of the decedent's death was improperly included in his gross estate. At his death nothing passed from the dead to the living. Another case is *Dimock* v. *Corwin*, 19 Fed. Supp. 56 (E. D. N. Y. 1937). This was an action of the same kind as the case at bar to recover an over-

payment of an estate tax. The decedent was an officer of the Standard Oil Company of New York, and under a death benefit plan in existence during his life the employee had the right to receive certain retirement payments for life, and to designate a beneficiary who would receive certain payments for one year following his death. If no designation were made there were no payments following the decedent's death. He designated his wife. It was held that the commuted value at the date of his death of the payments to which the wife became entitled was not properly included within the decedent's gross estate. On another point, and on appeal of the taxpayer, this case went to the Circuit Court of Appeals, 99 Fed. 2d, 799, and to this Court, 306 U. S. 363, and was affirmed. Our point was not involved, but it is highly significant that the government did not take a cross appeal.

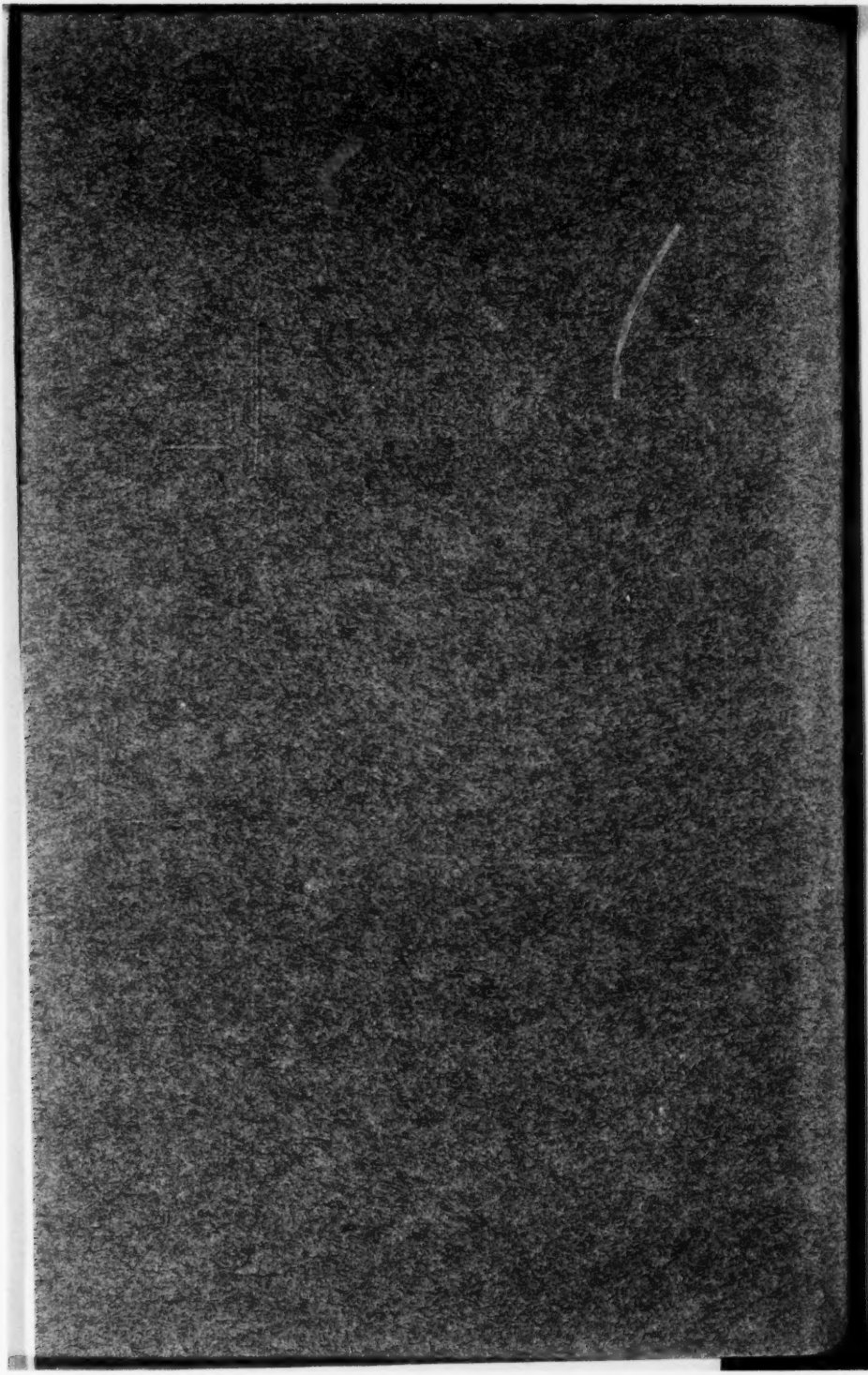
We submit that both of these cases are very much in point. The only distinction between them is found in the fact that in the case at bar the payments after the decedent's death went to his executor and not to a third person. It is earnestly submitted, however, that that is a distinction without a difference. Under and by virtue of the judgment the payments to Jay Gould ceased at his death. He had no further right to receive them, and it is not by any will of his or the operation of any intestate law or of any power of appointment that the payments are receivable by the executor. On the other hand, it is solely by virtue of the judgment itself. The decedent had a life estate which terminated. Thereupon a new estate in remainder began. The fact that the person entitled to that estate in remainder was the decedent's executor is a wholly immaterial fact.

We concede that until the decedent's death it was uncertain whether the payments falling due thereafter would

be made to an executor or to an administrator, because not until his death could it be ascertained whether he died testate or intestate. There was therefore that contingency which did not exist in *Dimock* v. *Corwin, supra.* The decision in *Dimock* v. *Corwin* and in the *Chemical Bank* case, *supra,* would necessarily, however, have been the same if the payments in those cases after the decedent's death were, say, to the wife if the decedent died without issue living at his death, but if he left issue him surviving, then to the issue. In *Bull* v. *United States, supra,* the profits accruing after date of death were, just as in the case at bar, payable to the decedent's executors or administrators. The point in those cases is that nothing passed from the dead to the living, so that, any more than where a testator leaves property to A for life, the remainder to B in fee, is there any transfer tax payable on A's death. His interest simply comes to an end, and the other interest previously created by the instrument, in this case by the New York judgment, then come into possession. Just as in *Bull* v. *United States, supra,* the profits accruing and paid to the estate of the decedent during the continuation of the partnership after the decedent's death were held to be no part of the decedent's gross estate, so, in the case at bar, moneys payable to the executor after the decedent's death pursuant to the New York judgment are no part of the decedent's gross estate. For this reason, too, in addition to those considered under Point I, *supra,* the judgment below should be reversed.

Wherefore it is respectfully submitted that the Writ of *Certiorari* prayed for should be granted.

Otto A. Hack,
George W. C. McCarter,
Of Counsel with Petitioner.



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407959—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 324

JAMES C. B. MILLARD, AS EXECUTOR OF THE WILL OF JAY GOULD, DECEASED, PETITIONER

v.

HARRY L. MALONEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 77) is reported in 36 F. Supp. 41. The opinion of the Circuit Court of Appeals (R. 99) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 6, 1941. (R. 104.) The petition for a writ of certiorari was filed on July 31, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. The decedent created a trust in 1922 providing that the income should be paid to him during his life, and upon his death the principal to be paid to his descendants in such proportions as he should by his will appoint, or, if he should leave no descendants, to the persons named in his will, with the right reserved and subsequently exercised by the decedent to charge the trust fund by will with the payment of the income therefrom to his wife during her life. The decedent died in 1935, survived by his wife and three children. The question is whether the value of the corpus of the trust created by the decedent is includible in his gross estate under section 302 (d) of the Revenue Act of 1926.

2. In 1927 a judgment was entered whereby the decedent and his executors or administrators became entitled to the payment of certain amounts until the death of the survivor of the two payors. The question is whether the commuted value as of the date of decedent's death of the payments receivable under the judgment entered in 1927 is includible in the gross estate of the decedent under section 302 (a) of the Revenue Act of 1926.

STATUTES INVOLVED

Revenue Act of 1926, 44 Stat. 9 (26 U. S. C. sec. 411):

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *.
>
> (h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Revenue Act of 1934, 48 Stat. 680 (26 U. S. C. sec. 411):

> SEC. 401. REVOCABLE TRUSTS.
>
> Section 302 (d) of the Revenue Act of 1926 is amended to read as follows:

> "(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

STATEMENT

The facts, as alleged in the complaint and admitted by answer (R. 2–34, 35–40), as stipulated (R. 41–52), and as found by the District Court (R. 89–90), may be summarized as follows:

The decedent, Jay Gould, sometimes referred to as Jay Gould II, died testate on January 26, 1935, survived by his widow and three children (R. 3, 8, 36, 51).

A deficiency in estate taxes was assessed by the Commissioner of Internal Revenue against the estate of the decedent arising out of the inclusion in the gross estate of the decedent of two separate items (R. 8–10, 37–38). The executor of the decedent's estate paid the deficiency, filed a claim for refund, and, upon its rejection, instituted the present suit against the Collector of Internal Revenue for the First District of New Jersey. (R. 2–3, 13–15, 39.)

The first item included by the Commissioner in the gross estate of the decedent, giving rise to a portion of the deficiency assessment in question, consisted of the value of the corpus of a trust created by the decedent on October 19, 1922 (R. 4, 6–9, 36–37). Under the trust indenture the decedent was to receive the net income during his lifetime and upon his death the principal of the trust fund was to be distributed as follows: (a) to the decedent's descendants, in such proportion as he should appoint by his will, otherwise *per stirpes;* (b) if there were no descendants, then to the persons named in decedent's will, otherwise to those who would take under the New York rule as to the personal property of an intestate; and (c) subject to the power of the decedent by will to direct that the trust income be paid to his wife for her life or any shorter period (R. 21–22, 44–45).

By his will, dated June 29, 1934, the decedent charged the trust fund, created by the agreement of October 19, 1922, with the payment of the income therefrom to his wife for her lifetime (R. 75, 89).

The second item included in the decedent's gross estate out of which the remainder of the deficiency assessment in question arose consisted of the commuted value, as of the date of decedent's death, of certain payments due under a judgment entered on May 31, 1927, by the Supreme Court of the State of New York. This judgment was entered pursuant to a compromise in litigation commenced in

1916 for an accounting in which the parties sought to surcharge the trustees of the estate of decedent's grandfather for sums aggregating in excess of $20,000,000. (R. 42–44.) As a result of the judgment, certain amounts became payable to the decedent, and his executors or administrators for and during the lifetimes of Helen G. Shepard and Howard Gould, until the death of either, and thereafter certain reduced amounts were payable until the death of the survivor. Payments under the judgment were made to the decedent until his death on January 26, 1935, and thereafter to his executor. (R. 43–44, 89–90.)

The District Court held that the two items in question were properly included in the gross estate of the decedent (R. 90), and its judgment was affirmed by the Circuit Court of Appeals (R. 104).

ARGUMENT

I

1. The first question involves the inclusion in the decedent's gross estate under section 302 (d) of the Revenue Act of 1926, 44 Stat. 9, of the value of the corpus of a trust created by him in 1922. That section provides that there shall be included in a decedent's gross estate the value at the time of his death of property transferred in trust where the enjoyment thereof was subject at the date of his death "to any change" through the exercise of a power to alter, amend, or revoke.

Under the trust agreement the decedent had the power to create by will a life estate in favor of his wife, and this power was in fact exercised by him. The decedent further had the power to designate the proportions in which his descendants should share in the principal of the trust upon his death. The decedent's three children survived him, and thus at the date of his death the decedent had the power to make substantial changes in the course of the devolution of the property transferred in trust, for he could have selected any one of his children as the ultimate beneficiary, and have entirely divested the other children of any interest in the property.

The fact that the decedent could not exercise the retained power in favor of himself or in such a manner as to regain the property is immaterial under section 302 (d). *Porter* v. *Commissioner,* 288 U. S. 436; *Witherbee* v. *Commissioner,* 70 F. (2d) 696 (C. C. A. 2), certiorari denied, 293 U. S. 582; *Cook* v. *Commissioner,* 66 F. (2d) 995 (C. C. A. 3), certiorari denied, 291 U. S. 660; cf. *Rasquin* v. *Humphreys,* 308 U. S. 54. Also if, as here, the settlor retains the power to make substantial changes in the terms of a trust, the property is to be included in his estate under section 302 (d) even though the settlor does not have an unrestricted choice as to beneficiaries. *Chickering* v. *Commissioner,* 118 F. (2d) 254 (C. C. A. 1), pending on petition for certiorari, No. 153, present Term; *Com-*

missioner v. *Chase Nat. Bank,* 82 F. (2d) 157 (C. C. A. 2), certiorari denied, 299 U. S. 552; *Holderness* v. *Commissioner,* 86 F. (2d) 137 (C. C. A. 4); *Hoblitzelle* v. *United States,* 3 F. Supp. 331 (C. Cls.).

2. Similar arguments to those made by the taxpayer in the present case are advanced in the petition for certiorari in *Chickering* v. *Commissioner, supra,* and this Court is respectfully referred to the Government's brief in opposition in that case for our answer to the contentions that the decision below applying Section 302 (d) to this case violates the Fifth Amendment to the Constitution and that the decision conflicts with *Helvering* v. *Helmholz,* 296 U. S. 93.

3. The case of *White* v. *Poor,* 296 U. S. 98, cited by the petitioner as being in conflict with the decision below, is irrelevant here. This Court's decision was based on the ground that the settlor did not retain, in the original declaration of trust, a power to alter, amend, or revoke, but acquired any right to participate in a future termination of the trust solely by virtue of the action of the other trustees and beneficiaries in selecting her as a trustee subsequent to the creation of the trust.

4. *Brady* v. *Ham,* 45 F. (2d) 454 (C. C. A. 1), and *Cover* v. *Burnet,* 53 F. (2d) 915 (App. D. C.), relied upon by the petitioner as in conflict, were, we submit, overruled by this Court in *Porter* v. *Commissioner,* 288 U. S. 436, 440. Furthermore, the more recent views of the First Circuit and the Court of

Appeals for the District of Columbia are expressed in *Chickering* v. *Commissioner, supra,* and *Dort* v. *Helvering,* 69 F. (2d) 836 (App. D. C.), certiorari denied, 293 U. S. 569, 630, which agree with the decision in the present case.

5. The decisions in *Mackay* v. *Commissioner,* 94 F. (2d) 558 (C. C. A. 2), and *Commissioner* v. *Flanders,* 111 F. (2d) 117 (C. C. A. 2), cited by the petitioner, are clearly not in conflict with the present case. Those cases involved situations where the right to alter or revoke could be exercised only with the consent of the person beneficially interested. The court in its opinion in the *Mackay* case makes it clear (p. 562) that it was not overruling its decision in *Commissioner* v. *Chase Nat. Bank,* 82 F. (2d) 157, which is on all fours with the case at bar.

II

The second question involves the inclusion in the gross estate of the decedent of the value as of the date of his death of the payments receivable under the judgment of the Supreme Court of New York; no question is raised as to the commuted value used by the Commissioner. The judgment provided that certain amounts should be paid to the decedent and his executors or administrators until the death of the survivor of Howard Gould and Helen G. Shepard. We submit that the court below properly held that the decedent had an absolute right to receive these payments for a period limited by the

lives of others, and that the commuted value of the payments should be included in the decedent's estate under section 302 (a) of the Revenue Act of 1926, *supra*.

The right to receive the annual payments until the death of the survivor of the two persons on whose lives the payments were limited was a valuable right which could be sold at any time. The payments accruing after the death of the decedent were subject to the claims of his creditors and his executor testified that the money was actually being used for payments of debts. (R. 65.) The payments were accordingly subject to all of the elements that warrant the inclusion in the decedent's estate; they were subject to sale, they were liable for the payment of the decedent's debts, and the decedent had the power to dispose of them during his lifetime or by will as he saw fit. They were analogous to an estate in real property *pur autre vie*. The Treasury Regulations provide that the value of such interest should be included in a decedent's estate. Treasury Regulations 80 (1934 Ed.), Article 11. See also *Kinney's Estate* v. *Commissioner*, 80 F. (2d) 568 (C. C. A. 9).

Bull v. *United States*, 295 U. S. 247, relied upon by the petitioner, presented quite different facts. There this Court held that the profits of a partnership, continued after the death of a decedent member, were income to the executors but that they could not be treated as part of the decedent's estate

since the partners had contributed no capital and owned no tangible property connected with the business. The present case does not involve a partnership, where the income arose as a result of activities subsequent to decedent's death, but is a case where the decedent was without more entitled to the payment of a certain sum of money during the lifetime of two other persons. There is no dispute that as of the date of the decedent's death the right to receive that sum of money had a value, and it is the value of the right to receive that has been included in the decedent's estate.

Chemical Bank & Trust Co. v. *Commissioner,* 37 B. T. A. 535, cited by the petitioner, involved a joint and survivor annuity and the decedent had no power to dispose of the proceeds after his death. *Dimock* v. *Corwin,* 19 F. Supp. 56 (E. D. N. Y.), affirmed on other points, 99 F. (2d) 799 (C. C. A. 2), and 306 U. S. 363, is also distinguishable. While there the decedent had a right to nominate or designate the person who should receive a death benefit, the district court held that the right was of such a nature that it could not have been levied upon to satisfy judgment against the decedent during his lifetime; nor could the right have been sold or assigned by the decedent.

CONCLUSION

There is no conflict in the decisions and no question of importance is presented. The decision of

the court below is clearly correct, and the petition for a writ of certiorari should accordingly be denied.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 324.

JAMES C. B. MILLARD, as Executor of the Will of Jay Gould, deceased,

Petitioner,

vs.

HARRY A. MALONEY,

Respondent.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

I.

As to the Trust Fund.

Counsel for the respondent in their brief in opposition attempt to dispose of *Helvering* v. *Helmholz*, 296 U. S., 93, upon which we strongly rely. We refer particularly to page 9 of their brief in *Chickering* v. *Helvering*, No. 153, which is incorporated by reference in their brief in opposition in this case. Realizing, no doubt, the devastating effect of the fact that in *Helvering* v. *Helmholz* the decedent had a general power to appoint for life to any natural person, counsel try to distinguish that case. They say that the Commissioner did not appeal from the Board of Tax Appeals holding that the life interest appointed by the decedent should

not be included in the gross estate. In the first place the opinion of the Court of Appeals clearly shows that what was not appealed was the Board's ruling that the appointed life estate was not included on the ground that the power was a special rather than a general power. That is an entirely different question. Be that as it may, it is an inescapable fact that the power existed and was exercised. Nevertheless, this court held that the decedent did not retain sufficient control until death to make (d) applicable retroactively without violating the Fifth Amendment. In so holding this Court could not disregard that power. It was mentioned in the opinion 296 U. S., at pages 94 and 96.

Counsel also says that the effect of that power was not argued in the briefs in this court. Again we say the power was there and it cannot be assumed that this court overlooked it. Moreover, what is or is not said in briefs or oral argument is no guide to the inferior courts or to counsel seeking to advise in subsequent cases.

We submit this court should not overlook that until the first enactment of (d) in 1924 the Federal Estate Tax was a tax upon the right to *give* and not upon the right to *receive*. So this Court held in *Knowlton* v. *Moore,* 178 U. S., 41; *Edwards* v. *Slocum,* 264 U. S., 61, and *Nichols* v. *Coolidge,* 274 U. S., 531, 537. The tax remains such except insofar as thereafter changed by amendments. This Court indicated such a change in *Helvering* v. *City Bank Farmers Trust Company,* 296 U. S., 92, where the amendment (d) was under consideration:—

> "It was appropriate for Congress to prescribe that if, subsequently to the passage of that Act, the creator of a trust estate saw fit to reserve to himself jointly

> with any other person the power of revocation or alteration, the transaction should be deemed to be testamentary in character, that is, *treated for the purposes of the law as intended to take effect in possession or enjoyment at the death of the settlor.*" (Italics ours.)

The amendment (d) thus supplies the *legal intent* to make the transaction deemed as one to take effect at death —a tax on the right to receive.

At the same time the City Bank Farmers Trust Co. case was decided this Court also decided *Helvering* v. *Helmholz,* 296 U. S. 93, holding that the Amendment (d) could not be applied retroactively. And yet, in spite thereof, the Circuit Court of Appeals thereafter, in passing on the taxability of irrevocable transfers made prior to its enactment, construed such transfers in the light of the phraseology of amendment (d) as though the phraseology of (d) had always been a part of the law,—retroactive application nonetheless. *Commissioner* v. *Chase Bank,* 82 Fed. 2d, 157; *Witherbee* v. *Commissioner,* 70 Fed. 2d, 696; *Cook* v. *Commissioner,* 66 Fed. 2d, 995; and the case at bar. That was due to the fact that the Circuit Courts of Appeals in those cases misconstrued this Court's real ground for holding the transfers in *Porter* v. *Commissioner,* 288 U. S., 436, taxable. The Government has consistently cited the Porter decision in this Court in cases where the question of retroactive application of the amendment (d) was in question. But this Court has never taken that position. This has led to a great deal of confusion which should be clarified by this Court.

The Government in its brief in *Hassett* v. *Welch,* 303 U. S. 303 presented to this Court the opportunity to hold

the Federal Estate Tax generally in the nature of certain state transfer tax acts where the tax is on the right of the beneficiary to receive. The point under consideration there was whether the joint resolution of Congress of March 3, 1931, taxing transfers as intended to take effect at death where a life estate was retained, was applicable. This Court there held that that amendment was intended to be applied prospectively only. It did not pass upon the point above mentioned presented to it by the Government. Had this Court been favorable thereto, a splendid opportunity was thereby presented to it to hold the transfer there taxable.

The opinion of the Circuit Court of Appeals for the First Circuit in *Chickering* v. *Commissioner,* 118 Fed. 2d, 254 is inconsistent with the above, and the confusion which it presents should now be clarified by this Court. *Chickering* v. *Commissioner* relies mainly on earlier cases. Either those cases are not in point or they are misconstrued. One of the cases principally relied on is *Tyler* v. *U. S.,* 281 U. S., 497, which held taxable the survivor's acquisition in a tenancy by the entireties. It clearly appeared from the opinion of Mr. Justice Sutherland, at page 500, that the estate by the entireties was created after the passage of the applicable Act. That case, therefore, can have no bearing on the case at bar, where the deed of trust took effect prior to the original enactment of sub-division (d) in 1924.

Hobitzelle v. *U. S.,* 3 Fed. Supp. 331 (Court of Claims). Here too the trust was created in 1927 and after the enactment of subdivision (d). Furthermore, the decedent reserved power of control almost the substantial equivalent of that reserved by the decedent in *Porter* v. *Commissioner,* 288 U. S., 436.

Holderness v. *Commissioner,* 86 Fed. 2d, 137, was also a case where the trust was created in 1929, and therefore after the enactment of subdivision (d).

The Circuit Court of Appeals in the Chickering case also relied on *Porter* v. *Commissioner,* 288 U. S., 436. Its error in relying on that case is in failing to see that the true foundation of the decision of this Court in that case (as pointed out in our main brief) is that the power reserved by the decedent in the Porter case was so extensive as to be the substantial equivalent of continued ownership until date of death. In the Chickering case the power was simply to select among a small group of beneficiaries. This is far from the equivalent of continued ownership, and far from making the decedent dominant with respect to the trust. In reaching this interpretation of *Porter* v. *Commissioner,* the Court of Appeals in the Chickering case attempted to distinguish and escape the force and effect of *Helvering* v. *Helmholz* by ignoring or overlooking the fact that in the Helmholz case the decedent had a general power to appoint for life to any natural person. As we have said, the decision in the Helmholz case is such a gloss upon the Porter case as conclusively to establish the real meaning of the Porter case, as requiring the reserved control to be the substantial equivalent of continued ownership, the retention by the decedent of a dominant position. If the power to appoint for life to any natural person is not the equivalent of continued ownership, then neither is the special power to allocate the shares of the corpus among the small class of descendants, as in the case at bar. Decisions such as that of the Circuit Court of Appeals for the First Circuit in the Chickering case, and that of the court below in this case,

show, however, that the true intent and meaning of the Porter case is not clear to the Circuit Courts of Appeal. We earnestly urge that it is the duty of this Court to exercise its supervisory jurisdiction and clarify the situation.

II.

As to the payments pursuant to the New York judgment.

Here counsel seek to distinguish *Bull* v. *United States,* 295 U. S., 247. See page 10 of this brief. In our case, as in *Bull* v. *United States,* no capital fund has been contributed or set up. The moneys are payable to the decedent's executor, in the Bull case pursuant to a partnership agreement, in ours pursuant to a stipulation confirmed by a judgment. In the Bull case the moneys were produced by the activities of the surviving partners, in ours by the activities of the payors, Helen and Howard, in diverting a portion of their income, whether earned or otherwise, to making the payments. Surely the cases are on all fours.

Respectfully submitted,

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